

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 480 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

CHIMANLAL J GANDHI LEGAL

RESPRESTATIVE (NATVERLAL JSHAH

Versus

ANILBHAI R.BAKERI

Appearance:

Shri K.R.Raval, Advocate, for Shri A.D.Shah, Advocate,
for the appellant - complainant.

Shri K.J.Shethna, Advocate for Respondents Nos.1 and 2.

Shri Y.S.Lakhani, Advocate, for Respondent No.3.

Respondent No.4 expired.

Shri M.A.Bukhari, Additional Public Prosecutor, for
Respondent No.5 - State.

CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 07/11/96

ORAL JUDGEMENT

The original complainant has invoked the appellate jurisdiction of this court by means of this appeal under Section 378 (4) of the Code of Criminal Procedure, 1973 (the New Cr.PC for brief) after obtaining its special leave for questioning the correctness of the judgment and order of acquittal passed by the learned Metropolitan Magistrate of Court No.3 at Ahmedabad on 18th October 1980 in Criminal Case No.816 of 1977 acquitting respondents Nos.1 to 4 herein of the offences punishable under Sections 409, 408, 467, 471, 477-A and 120-B read with Section 34 of the Indian Penal Code, 1860 (the IPC for brief).

2. It is not necessary to set out in detail the facts giving rise to this appeal. It may be sufficient to note that one Natwarlal J. Shah became the Chairman of one Subha Prayag Cooperative Housing Society Ltd. (the Society for convenience) and during his tenure he appears to have found irregularities committed by the former office-bearers qua construction of houses for members of the Society in collusion with its organiser and builder. He therefore filed his complaint before the Metropolitan Magistrate of Court No.3 at Ahmedabad on 27th April 1977 charging respondents Nos.1 to 4 herein with the commission of the aforesaid offences. It came to be registered as Criminal Case No.816 of 1977. It ultimately ended in acquittal of respondents Nos.1 to 4 herein by the judgment and order of acquittal passed by the learned trial Magistrate on 18th October 1980 in Criminal Case No.816 of 1977. That aggrieved the original complainant. He therefore moved this court by special leave to appeal under Section 378 (4) of the New Cr.PC and, on granting of such special leave by this court to the original complainant, the present appeal came to be filed for questioning the correctness of the aforesaid judgment and order of acquittal passed by the learned trial Magistrate. During the pendency of this appeal before this court, the original appellant breathed his last. The successor Chairman has however opted to continue to proceed with the appeal by substituting himself in the place of the deceased appellant as the Chairman of the Society.

3. On behalf of the appellant a pursis has been filed today for withdrawal of this appeal. It is accompanied by some two Resolutions passed by the Executive Committee of the Society in its meeting held on 6th November 1996. It has been resolved by the Executive

Committee of the Society that, on advice of the advocate for the appellant regarding the merits of the appeal and in view of the fact that the original complainant was no longer alive and with a view to maintaining good relations with the parties, it was resolved not to proceed with the appeal and to withdraw it. The Executive Committee of the Society by the aforesaid Resolution has authorised the Chairman to withdraw this appeal before this court. Apropos, the Chairman has submitted this pursis before this court for withdrawal of the appeal. It is kept on record. The question would now therefore arise whether or not the appellant can be permitted to withdraw this appeal once it has been admitted for hearing.

4. Ordinarily, the death of the original complainant would not result in abatement of the appeal of the original complainant as the appellant in view of the binding ruling of the Supreme Court in the case of KHEDU MOHTON v. STATE OF BIHAR reported in AIR 1971 Supreme Court at page 66. It has been held therein that the court has to proceed with the appeal on its own merits even if the original complainant as the appellant passes away during the pendency of his appeal.

5. The aforesaid ruling of the Supreme Court is obviously binding to this court. It is however distinguishable from the facts of the present case. In that case, the complainant had his personal grievances leading him to file appeal. Since during his life-time he expressed no desire not to proceed with the appeal, the appeal had to be carried to its logical conclusion as ruled by the Supreme Court. In the present case, the original appellant espoused the cause of members of the Society against its office-bearers acting against its interests in collusion with the builder and the organiser thereof. He had set the machinery of criminal law into motion against respondents Nos.1 to 4 herein in his representative capacity on behalf of members of the Society. However, this appeal is not sought to be disposed of as having abated on the ground of his demise during the pendency of this appeal. This is sought to be withdrawn by the new Chairman under authority to withdraw the proceeding by a Resolution passed by the Executive Committee of the Society. In that view of the matter, the aforesaid binding ruling of the Supreme Court is distinguishable and will not be applicable in the present case.

6. My attention has been invited to the Full Bench ruling of the Lahore High Court in the case of EMPEROR v.

GULAM MOHAMMAD reported in AIR 1942 Lahore at page 296, the Division Bench ruling of the Calcutta High Court in the case of SUDHINDRA NATH DUTT v. THE STATE reported in AIR 1957 Calcutta at page 677, another ruling of the Calcutta High Court in the case of BISWANATH CHAKRAVARTY v. HARIPADA DE DHARA reported in AIR 1959 Calcutta at page 443 following its aforesaid Division Bench ruling, the ruling of the Rajasthan High Court in the case of CHHITAR v. THE STATE reported in 1957 Criminal Law Journal at page 155 and the Division Bench ruling of the Karnataka High Court in the case of PALEKANDA KARUMBIAH v. STATE OF KARNATAKA reported in 1989 Criminal Law Journal NOC at page 73 (Kant.). All these rulings have taken a consistent view that the appeal once admitted could not be permitted to be withdrawn. Learned Advocate Shri Raval for the appellant wants me to take a view different from the view taken in the aforesaid rulings of different High Courts. Learned Advocate Shri Shethna for respondents Nos.1 and 2 and learned Advocate Shri Lakhani for respondent No.3 support learned Advocate Shri Raval for the appellant in this case. Learned Additional Public Prosecutor Shri Bukhari for respondent No.5 State has submitted that the aforesaid rulings of the various High Courts need to be taken into consideration for deciding the merits of the pursis for withdrawal. He has further submitted that the disputes involved in this litigation are essentially between the private parties and this appeal has been instituted by the private party and not by the prosecution agency.

7. It may be mentioned at this stage that respondent No.4 herein was accused No.4 in the trial court. It is not in dispute that he is no longer alive. He is stated to have breathed his last during the pendency of this appeal. The police report in that regard at the instance of respondent No.5 - State is on the record of the case. This appeal qua deceased respondent No.4 would stand abated under Section 394 of the New Cr.PC. It is not necessary to decide at this stage whether or not the appeal as a whole would abate on the death of original accused No.4.

8. So far as the aforesaid Full Bench ruling of the Lahore High Court in the case of GULAM MOHAMMAD (supra) is concerned, it was taken in appeal against conviction. That appeal was presumably under the relevant provisions contained in Section 417 of the Code of Criminal Procedure, 1898 (the Old Cr.PC for brief). On interpretation of Section 423 thereof, the Full Bench of the Lahore High Court came to the conclusion that the appeal once admitted for hearing cannot be permitted to

be withdrawn. The aforesaid ruling is distinguishable on the ground that the present appeal is against the judgment and order of acquittal and it is not preferred by the State Government as the prosecution agency but it was preferred by the private complainant under Section 374 (4) of the New Cr.PC.

9. On the same reasoning is distinguishable the Division Bench ruling of the Calcutta High Court in the case of S.N.DUTTA (supra) and the aforesaid ruling of the Rajasthan High Court in the case of CHHITAR (supra).

10. The ruling of the Calcutta High Court in the case of BISWANATH CHAKRAVARTY (supra) was in an appeal at the instance of the original complainant. It has obviously been based on the Division Bench ruling of the very same High Court of Calcutta in the case of S.N.DUTTA (supra). The distinction between the appeal filed by the State Government and that filed by the private complainant was not entertained as not material. The conclusion in that regard appears to be ipse dixit. No reasons worth the name are assigned for not taking into consideration the distinction between an appeal at the instance of the State Government as the prosecution agency and that at the instance of the private complainant at whose instance the case came to be instituted.

11. At this stage, a reference deserves to be made to the binding ruling of the Supreme Court in the case of JAMUNA SINGH v. BHADAI SHAH reported in AIR 1964 Supreme Court at page 1541. In that case, it has been held that the case can be said to have been instituted on complaint for the purposes of Section 417 (3) of the Old Cr.PC if the cognizance of the offence was taken by the Magistrate on the basis of such complaint by proceeding under Section 200 thereof or the like provisions. It has further been held that, if the cognizance of the offence is taken on the basis of the police report, the case could not be said to have been instituted on complaint for the purposes of the said statutory provision. This distinction as to the right of appeal by the private complainant has to be borne in mind.

12. It may be noted that, even under the relevant provisions contained in Section 417 of the Old Cr.PC, the original complainant could prefer appeal against the judgment and order of acquittal only after obtaining special leave from the High Court. Under sub-section (5) thereof, a provision was made that the appeal by the State Government against the order of acquittal would not lie under section sub-section (1) thereof if special

leave to appeal at the instance of the private complainant was refused. The relevant provisions contained in Section 378 of the New Cr.PC are practically in pari materia with Section 417 of the Old Cr.PC. This position has also to be borne in mind.

13. The aforesaid ruling of the Calcutta High Court in the case of BISWANATH CHAKRAVARTY (supra) appears to have overlooked Section 561-A of the Old Cr.PC which is practically in pari materia with Section 482 of the New Cr.PC. It needs no exposition of law to the effect that the High Court enjoys inherent powers to make such orders as may be necessary inter alia to secure the ends of justice.

14. It may be quite worthwhile at this stage to look at certain relevant provisions contained in the New Cr.PC. Section 257 thereof deals with summons cases. It authorises a private party as the complainant to withdraw its complaint at any stage of the proceeding. Section 321 thereof would apply to all trials thereunder. It would be a trite statement to say that it would apply to warrant cases as well. It empowers the Public Prosecutor to withdraw the prosecution case by leave of the court at any stage of the proceeding before pronouncement of the judgment. If the case is withdrawn before the charge is framed, it would result in discharge of the accused. If it is done after framing of the charge, it would result in acquittal of the accused.

15. It is true that the aforesaid statutory provision contained in Section 321 of the New Cr.PC is not made applicable to appeals. In fact, as rightly pointed out in the aforesaid rulings of various High Courts, there was no provision in the Old Cr.PC nor is there any in the New Cr.P.C. permitting withdrawal of an appeal filed against any judgment and order of the lower court whether it has ended in acquittal or conviction of the accused. Besides, Section 321 of the New Cr.PC empowers the Public Prosecutor or the Assistant Public Prosecutor in charge of the prosecution case to withdraw from the prosecution; it does not empower any private complainant to do so. According to the well settled principles of law on interpretation thereof, the Public Prosecutor has to exercise his own discretion in the matter and he may only take into consideration the suggestions received for withdrawal of the prosecution case. The appropriate Government as the prosecution agency may instruct the Public Prosecutor to withdraw the case, and yet the Public Prosecutor may not withdraw it in exercise of his discretion and such exercise of discretion would be valid

on the facts and in the circumstances of the case. At the same time, the Public Prosecutor can exercise his discretion for withdrawal from the prosecution case before pronouncement of the judgment. Such withdrawal can be at the instance of instructions from the Government. If the case is instituted on a police report, he can act on such Government instructions. If the case is instituted on a private complaint and if such private complainant thinks it fit not to proceed with the prosecution, there is no reason why the Public Prosecutor cannot exercise his discretion for withdrawal from the prosecution at the instance of the private complainant.

16. It is true that, if offences are compoundable, the private complainant can compound the offences with the leave of the court wherever necessary. When the offences are not compoundable, there is no reason why the private party should not be permitted to instruct the Public Prosecutor to withdraw from the prosecution. It may happen that a private party may be aggrieved by some activity of his neighbour and in haste and in the fit of anger he might institute a complaint in the court and the cognizance is taken at his instance on his complaint. It is possible that, when passions subside, he might regret his decision to have acted in haste in approaching the criminal court. Should he be precluded from allowing the wisdom to be dawned upon him at a later stage? Should he be precluded from allowing wiser counsels to prevail with passage of time and to have a truce with his neighbour or the offender if the cognizance of the case is taken on the basis of his complaint? It could be a case of act in haste and repent at leisure. A party should always be permitted to repent at leisure if he has acted in haste. If he does not want to proceed with a complaint, he need not be compelled to proceed with it if the case is instituted on his complaint. In that case, he can be permitted to approach the Public Prosecutor for his withdrawal from the prosecution, of course, by permission of the court under Section 321 of the New Cr.PC.

17. It is true that Section 321 of the New Cr.PC is applicable at the stage of trial and not at the stage of appeal. As rightly submitted by learned Additional Public Prosecutor Shri Bukhari for respondent No.5 State, different considerations would arise in the appellate proceeding against the judgment and order of acquittal under challenge at the instance of the private complainant. It is an admitted position on record that the State as the prosecution agency has not challenged the judgment and order of acquittal under challenge in this appeal. It has been impleaded as a party-respondent

because the law requires that to be done. It can be presumed that the State as the prosecution agency did not appeal against the judgment and order of acquittal in question in this case as the Public Prosecutor in charge of the case in the trial might have opined against carrying the matter in appeal. If that be so, it can safely be assumed that the Public Prosecutor has withdrawn from the case at that stage. It is, of course, after pronouncement of the judgment by the trial court. The appeal has usually been thought of as continuation of the original proceeding. The aforesaid ruling of the Calcutta High Court in the case of BISWANATH CHAKRAVARTY (supra) has taken that view. If that be so, the present appeal can be said to be continuation of the original proceeding. By not filing any appeal against the judgment and order of acquittal passed by the learned trial Magistrate, the Public Prosecutor can be said to have withdrawn from the prosecution case by not carrying the matter in appeal though this appellate proceeding can be said to be continuation of the original proceeding though at the instance of the original complainant. If the original complainant at the stage of trial could have instructed the Public Prosecutor to withdraw from the prosecution case and if the Public Prosecutor had exercised his discretion in favour of withdrawal from the prosecution, the trial would have ended before pronouncement of the judgment. If a private complainant could have done so and the trial could be brought to an end before pronouncement of the judgment, he should be permitted to do so even at the appellate stage treating the appellate proceeding to be continuation of the original proceeding. Since, so far as the appellate proceeding is concerned, the Public Prosecutor has withdrawn from the prosecution by means of continuation of the original proceeding, I find no reason why the present appellant as the successor Chairman of the original complainant should not be permitted to withdraw from the prosecution at the appellate stage on the basis that the appeal is a continuation of the original proceeding.

18. This would be in consonance with the spirit of Section 482 of the New Cr.PC. Inherent powers of this court thereunder could be exercised inter alia to secure the ends of justice. The contents of the pursis together with those of the Resolution annexed therewith would go to show that the Society wants to bury its hatchet for good. It wants to live in peace and to purchase peace by withdrawal of this appeal. It wants to maintain good relations with the surviving respondents - accused. In that view of the matter, the Society through its present

Chairman need not be compelled to proceed with the appeal against its will and wish. It should be permitted to withdraw this appeal. Even at the cost of repetition, it may be reiterated that such permission to withdraw from the proceeding at the appellate stage would be in consonance with the spirit of Section 482 of the New Cr.PC and it would result in securing the ends of justice. This would be more particularly in view of the fact that the machinery of criminal law was set to motion by the original complainant as the Chairman of the Society by filing his complaint as early as on 28th April 1977. Nearly two decades have rolled by since then. Papa time might have healed the wounds. It would not be in the interests of anyone to reopen such wounds by carrying this appeal to its logical conclusion. In that view of the matter, I think the present appellant should be permitted to withdraw this appeal.

19. With respect, in its aforesaid ruling in the case of BISWANATH CHAKARAVARTY (supra), the Calcutta High Court has not examined the case from this angle. With respect, I am unable to persuade myself to agree with the same. It may however be made clear at this stage that I have examined this case only from the angle of the original complainant as the appellant against the judgment and order of acquittal. I have not examined the case from the point of view whether or not the appeal can be permitted to be withdrawn if it is instituted by the State Government as the prosecution agency against the judgment and order of acquittal under Section 378 (1) of the New Cr.PC or it is instituted by the accused against the judgment and order of conviction under Section 374 thereof.

20. In view of my aforesaid discussion, I think this pursis for withdrawal of the appeal at the instance of the appellant deserves to be acted upon and this appeal deserves to be disposed of as withdrawn.

21. Even assuming that my aforesaid view is not correct, the pursis for withdrawal taken on record may be treated as composition of the disputes in the nature of offences by and between the parties. As rightly pointed out by learned Additional Public Prosecutor Shri Bukhari for respondent No.5 - State, the offences with which the accused stood charged at trial were not compoundable. However, as a special case, they can be permitted to be compounded.

22. I am fortified in my view by the binding ruling of the Supreme Court in the case of MAHESH CHAND v.

STATE OF RAJASTHAN reported in AIR 1988 Supreme Court at page 2111. In that case, the accused were charged with the offence punishable under Section 307 of the IPC. They were acquitted by the trial court but were convicted by the High Court. The offence was not compoundable under the law. The parties approached before the Supreme Court to treat it as a special case. Considering the special nature of the case, permission to compound the offence was granted by the Supreme Court. The aforesaid ruling of the Supreme Court in the case of MAHESH CHAND (supra) is binding to this court. It can be made applicable to the facts of the present case. As pointed out hereinabove, the complaint giving rise to the criminal trial and consequently the present appeal was lodged as back as on 28th April 1977. Nearly two decades (more than 19 years) have rolled by since then. The trial has ended in acquittal of the accused. As transpiring from the terms of the Resolution accompanying the pursis for withdrawal, the learned advocate for the appellant has explained the position of law governing appeal against the judgment and order of acquittal. If at that stage the aggrieved party wanted composition of the offences with which the surviving respondent accused stood charged, I think this is a fit case where treating it as a special case permission for composition thereof deserves to be granted. It cannot be gainsaid that composition of offences by permission of the court would result in acquittal. In that view of the matter, the judgment and order of acquittal passed by the learned trial Magistrate will have to be affirmed on account of composition of the offences by and between the parties.

23. In the result, this appeal is disposed of as withdrawn at the instance of the appellant. Even otherwise, the judgment and order of acquittal passed by the learned Metropolitan Magistrate of Court No.3 at Ahmedabad on 18th October 1980 in Criminal Case No.816 of 1977 is affirmed in view of composition of the offences by and between the parties. This appeal accordingly stands disposed of.

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